No. 86-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHAMPION INTERNATIONAL CORPORATION,

Petitioner,

v.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO-CLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE* IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

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QUESTION PRESENTED

May expert witness fees and expenses be included as part of an award of attorneys' fees under the Civil Rights Attorneys' Fees Act of 1976 and other fee-shifting statutes?

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INTEREST OF AMICUS [1]

[1] Letters consenting to the filing of this brief have been lodged with the Clerk of Court.

The NAACP Legal Defense and Educational Fund, Inc. has been in the forefront of civil rights litigation for many years. As part of that effort we have had a long standing interest in the award of attorneys' fees and costs adequate to ensure an appropriate level of private enforcement of the civil rights statutes. Thus, we have appeared as counsel or as amicus curiae in most of the leading civil rights attorneys' fees cases.[2]

As we explain below, this case involves a vitally important issue--whether litigation costs essential to the adequate representation of civil rights

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[2] E.g., Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Hutto v. Finney, 437 U.S. 678 (1978); Hensley v. Eckerhart, 461 U.S. 424 (1983).

plaintiffs are recoverable as part of an award of attorneys' fees under 42 U.S.C. § 1988. Amicus has a direct interest in the question since its ability to carry out its program will be seriously jeopardized if it cannot recover the often substantial expert witness fees and other costs it must expend in representing its clients.

ARGUMENT

I.

INTRODUCTION

Even though the judgment below was in favor of the civil rights plaintiff, amicus NAACP Legal Defense and Educational Fund, Inc., supports the grant of a writ of certiorari in this case because the erroneous legal ruling of the Fifth Circuit threatens to cripple civil rights enforcement in that circuit in direct contravention of the manifest intent of Cognress. The en banc court below

properly rejected the position taken by petitioner that a prevailing defendant in a civil rights case should be awarded costs of expert witnesses as part of their ordinary costs of litigation. But, it reached that conclusion as a result of a demonstrably incorrect and potentially devastating line of reasoning: that expert witness fees are never available in civil rights cases as part of an award of attorneys' fees under 42 U.S.C. § 1988 or any other federal fee-shifting statute. As we demonstrate below, this holding flies in the face of the extensive and clear legislative history of § 1988. If left standing, this en banc directive to the district courts in the circuit to disregard the prior decision in Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981),

will cripple civil rights enforcement.[3]

In sum, because of the importance of the availability of reimbursement for expert witness fees to the enforcement of the civil rights statutes, we urge that the Court grant the petition for writ of certiorari and affirm the district court's denial of costs on the following grounds: 1) Expert witness fees and related costs are not ordinarily recoverable under 28 U.S.C. § 1821; 2) such fees may, however, be recovered as part of an award of attorneys' fees under the civil rights statutes; 3) civil rights defendants, therefore, may recover such fees only if

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[3]Because there were narrower grounds to support its judgment, the broader ruling of the Fifth Circuit was both incorrect and unnecessary to the disposition of the issue before it. Despite the fact that the Fifth Circuit's opinion is technically dicta, there is the very real prospect that the lower courts in that circuit will feel bound by its reasoning.

the standards of Christiansburg Garment Company v. EEOC, 434 U.S. 412 (1978), are met; 4) the district court was correct when it held that Christiansburg was not satisfied because this action was not frivolous, unreasonable, or without foundation, nor was it brought in bad faith.

II.

THE QUESTION OF WHETHER EXPERT WITNESS FEES AND OTHER EXPENSES MAY BE RECOVERED UNDER THE ATTORNEYS' FEES STATUTES IS OF NATIONAL IMPORTANCE.

As the petition for a writ of certiorari correctly notes, there has been extensive litigation in the lower federal courts over whether and under what circumstances expert witness fees and other costs not specifically enumerated in the cost provisions of Title 28 of the United States Code may be recovered under the civil rights attorneys' fees statutes. The petitioner also correctly notes that

the decision of the court below is in square conflict with decisions of other courts of appeals and, indeed, repudiates a prior en banc decision of the Fifth Circuit itself that this Court accepted for review.[4]

The question presented is of the utmost importance for the enforcement of the civil rights statutes. But fortunately its difficulty is not proportionate to its importance. As demonstrated in Part III below, the various attorneys' fees provisions in the federal civil rights laws were enacted precisely because Congress knew that, without fee shifting that included expert witness fees, private plaintiffs would be unable to bring civil rights cases.

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[4]Jones v. Diamond, 636 F.2d 1364 (5th Cir.) (en banc), cert. granted sub nom. Ledbetter v. Jones, 452 U.S. 959, amended, 453 U.S. 911, cert. dismissed, 453 U.S. 950 (1981).

Accordingly, Congress acted to make effective the private enforcement of the civil rights statutes without which the eradication of discrimination and other constitutional violations could not be achieved.

This Congressional wisdom has become more prophetic as civil rights litigation has become more complex, and more costly. In addition to actual attorneys' fees, out-of-pocket costs have grown to be far beyond the resources of litigants and those few private organizations dedicated to the enforcement of civil rights. In particular, expert witness fees and related expenses have consumed an increasingly large proportion of the costs of successfully litigating civil rights claims. As this Court itself has noted, expert witness testimony is often essential in employment discrimination

cases,[5] voting rights cases,[6] school desegregation cases,[7] jury discrimination cases,[8] and police practices cases,[9] to name but five categories. Proof of discrimination and the development of adequate records has involved the use of statisticians, labor economists, historians, and other experts. Expert testimony requires not only the cost of the time of the witness but significant costs in developing the data and other evidence on which their testimony is based. In a complex Title VII case, for

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[5]Bazemore v. Friday, 478 U.S. ___, 92 L.Ed.2d 315, 329-31 (1986).

[6]Thornburg v. Gingles, 478 U.S. ___, 92 L.Ed.2d 25, 48 (1986).

[7]Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 9-10 (1971).

[8]Vasquez v. Hillery, 474 U.S. ___, 88 L.Ed.2d 598, 606 (1986).

[9]Tennessee v. Garner, 471 U.S. ____, 85 L.Ed.2d 1, 14 (1985).

example, it is essential to develop and effectively present statistical evidence. This requires assembling data, converting it to computer readable form, development of statistical programs, the analysis and preparation of reports and exhibits, and the presentation of testimony. It has been amicus' experience that, with few exceptions, Title VII class actions require out-of-pocket expenditures of at least $100,000 in order to prepare and present them adequately.

Costs of this magnitude are as much beyond the means of civil rights plaintiffs as are legal fees themselves. Under the decision of the Fifth Circuit, however, such costs, regardless of how necessary they are to the successful conduct of a case, may not be recovered because they are not enumerated in any statute or rule. The necessary result

will be that civil rights enforcement will be crippled because plaintiffs, their attorneys, and organizations with limited budgets will be faced with the inability to recover such expenses even when they are fully vindicated on the merits. As we will now demonstrate, this result is wholly at odds with the express intention of Congress when it enacted the Civil Rights Attorney's Fees Act of 1976.

III.

CONGRESS INTENDED THAT EXPERT WITNESS FEES AND OTHER NECESSARY COSTS OF LITIGATION BE RECOVERABLE AS PART OF ATTORNEYS' FEES.

The opinion of the court below is based on a wholly erroneous reading of the legislative history of the 1976 Fees Act. The court relied on the dissent in Jones v. Diamond, 636 F.2d at 1391 to the effect that there was "only . . . a single sentence from 'a Senate Report concerning legislation which could have contained ...

a provision [authorizing the award of excess expert witness' fees as costs] but did not.'" 790 F.2d at 1180, (emphasis in original). Nothing could be further from the truth: the entire legislative history of the Fees Act is permeated with the concern for the problem of expert witness fees and clearly reflects their inclusion within the fee shifting scheme of the Act. This concern was reflected at the hearings and in the debates; it was addressed by the use of statutory language designed to incorporate the prior case law that included expert witness fees "in the concept of attorneys' fees." Fairley v. Patterson, 493 F.2d 598, 606 n. 11 (5th Cir. 1974).

At the hearings that led to the Fees Act, Congress repeatedly heard that the economic deterrents to civil rights enforcement, and public interest

litigation generally, included both the problems of attorneys' fees and the great expense of expert testimony. Each of the first three witnesses in the 1973 Senate hearings raised this problem. One of these was Dennis Flannery, plaintiffs' counsel in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). He testified "that in a difficult case it cost tens of thousands of dollars to be able to conduct the case including being able to get expert witnesses...." The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcomm. on Representation of Citizen Interests of the Comm. on the Judiciary, United States Senate, 93 Cong., 1st Sess. 1108 (1973). (Statement of Senator Tunney the chairman of the subcommittee and later the sponsor of the Fees Act, summarizing testimony.) See also id. at 832-34

(Flannery statement); id. at 799 (Statement of J. Anthony Kline); id. at 1127-28 (Remarks of Senator Tunney).

This record was repeated in the House. One witness testified about a party having "to confine its activities to cross-examination of industry witnesses because it could not possibly afford to put on expert witnesses of its own...." Awarding of Attorneys' Fees, Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the Comm. on the Judiciary, House of Representative, 94th Cong., 1st Sess. 159 (1975). (Statement of Peter H. Schuck, Consumers Union, Inc.) The Lawyers' Committee on Civil Rights testified that civil rights cases were not being filed because counsel "are rarely able to afford the technical assistance of expert witnesses...." Id. at 89, 100 (Statement

of Armand Derfner and Mary Frances Derfner). One witness went so far as to state that if expert witness fees were not included, "the very point of the bills may be defeated." Id. at 136 (Statement of John M. Ferren).

Congress responded by crafting a bill that used the precise language of Titles II and VII and that intentionally adopted the prior case law under these statutes and the "private attorney general" theory. As explained in the Senate Report:

> S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000a-3 (b) and 2000e-5(k), and section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. §1973ℓ(e).... It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.

S. Rep. No. 94-1011, 94th Cong., 2d Sess.

2, 4 (1976).[10] Senator Kennedy, one of the sponsors of the bill,[11] further indicated that the bill "is intended simply to expressly authorize the courts to continue to make the kinds of awards of

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[10] The importance of the committee report in establishing congressional intent is well established: "A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." Zuber v. Allen, 396 U.S. 168, 186 (1969); Thornburg v. Gingles, 478 U.S. ___, 92 L.Ed.2d 25, 42 n.7 (1986).

[11] In Schwegman Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), this Court noted that: "It is the sponsors that we look to when the meaning of the statutory words is in doubt." Id. at 394-95. More recently, in Chrysler Corp. v. Brown, 441 U.S. 281 (1979), this Court explained that: "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history ... [but] must be considered with the Reports of both Houses and the statements of other Congressmen...." Id. at 311. Since Senator Kennedy's remarks as sponsor are wholly consistent with and complementary to the bulk of the legislative history, they possess added weight.

legal fees that they had been allowing prior to the Alyeska decision." 122 Cong. Rec. S 16252 (daily ed., Sept. 21, 1976).[12]

During the floor debate on the House side, Congressman Drinan, the bill's sponsor [13] and the author of the committee report, [14] amplified on the comments in that report. See H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 5-6 (1976).

The purpose of S.2278 -- and its

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[12] In the House, both Representatives Railsback and Bolling noted that the bill merely codified and restored the pre-Alyeska law. 122 Cong. Rec. H 12154; 12155 (daily ed., Oct. 1, 1976).

[13] See n. 11, supra.

[14] Mr. Drinan's exposition is especially authoritative since he was a member "of the House Judiciary Committee responsible for . . . [these] matters, author and chief sponsor of the measure under consideration, and a respected congressional leader in the whole area . . . ." Foti v. Immigration and Naturalization Service, 375 U.S. 217, 223 n. 8 (1963).

House counterpart, H.R. 15460 -- is to authorize the award of a reasonable attorney's fee in actions brought in State or Federal courts, under certain civil rights statutes . . . . By permitting fees to be recovered under those statutes, we seek to make uniform the rule that a prevailing party, in a civil rights case, may, in the discretion of the court, recover counsel fees.

The Civil Rights Attorney's Fees Awards Act of 1976, S. 2278 (H.R. 15460) is intended to restore to the courts the authority to award reasonable counsel fees to the prevailing party in case initiated under certain civil rights acts. The legislation is necessitated by the decision of the Supreme Court in Alyeska Pipeline Service Corp. against Wilderness Society, 421 U.S. 240 (1975) . . . .

The language of S. 2278 tracks the wording of attorney fee provisions in other civil rights statutes such as section 706(k) of Title VII -- employment -- of the Civil Rights Act of 1964. The phraseology employed has been reviewed, examined, and interpreted by the courts, which have developed standards for its application. . . . These evolving standards should provide sufficient guidance to the courts in construing this bill which uses the same term. I should add that the phrase "attorney's fee" would include the values of the legal services provided by counsel,

> including all incidental and necessary expenses incurred in furnishing effective and competent representation.

122 Cong. Rec. H 12159-12160 (daily ed., Oct. 1, 1976) (emphasis added).

Congressman Drinan's comments are particularly important for two reasons. First, they indicate the explicit intent of Congress to adopt the existing case law under Title VII.[15] More importantly, they indicate that Congress was conscious that expert witness fees and other out-of-pocket expenses had been recoverable even though they were not traditional "costs." Rather, these non-statutory costs had been treated in just the way Congressman Drinan explained:

> Costs not subsumed under federal statutory provisions normally

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[15]Representative Anderson, one of the floor managers of the bill, also made this point at the opening of the floor debates. 122 Cong. Rec. H 12150-51 (daily ed., Oct. 1, 1976).

> granting such costs against the adverse party . . . are to be included in the concept of attorneys' fees.

Fairley v. Patterson, 493 F.2d 598, 606 n. 11 (5th Cir. 1974) (emphasis added).

In 1976, when Congress debated and passed the Act, there was little doubt that expert witness fees had been recoverable under the "private attorney general" cases[16] and under the attorneys'

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16 It is significant that § 1988 was the legislative response to Alyeska; it was in the pre-Alyeska civil rights cases that expert witness fees were most consistently awarded. Fairley v. Patterson, 493 F.2d 598, 606 n. 11 (5th Cir. 1974) (costs of preparing reapportionment plan in voting rights case); Welsch v. Likins, 68 F.R.D. 589, 596-97 (D. Minn.) aff'd, 525 F.2d 987 (8th Cir. 1975) (§1983 suit on rights of mentally retarded); Sabala v. Western Gillette, Inc., 371 F. Supp. 385, 394 (S.D. Tex. 1974), aff'd in part on other grounds, rev'd in part on other grounds, 516 F.2d 1251 (5th Cir. 1975), rev'd on other grounds, 431 U.S. 951 (1977) (employment discrimination suit under Title VII and §1981: attorneys' and expert witness fees awarded under both Title VII and "private attorney general" theory); La Raza Unida v. Volpe, 57 F.R.D. 94, 102

fees provision of Title VII on which the Act was modeled.[17] Indeed, the award of expert witness fees to the prevailing party in Title VII litigation was so well established that it often went unchallenged. Davis v. County of Los Angeles, 8 E.P.D. ¶9444, p. 5048 (C.D. Cal. 1974) ("These charges were not challenged by defendants and are

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(N.D. Cal. 1972); Bradley v. School Bd. of City of Richmond, 53 F.R.D. 28, 44 (E.D. Va. 1971)(school desegregation); Jones v. Wittenberg, 330 F. Supp. 707, 722 (N.D. Ohio 1971)(jail case).

[17] Rios v. Enterprise Ass'n Steamfitters Local, 400 F. Supp. 993, 997 (S.D.N.Y. 1975), aff'd, 542 F.2d 579 (2d Cir 1976); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); Sabala v. Western Gillette, Inc., 371 F. Supp. 385, 394 (S.D. Tex. 1974), aff'd in part, rev'd in part on other grounds, 516 F.2d 1251 (5th Cir. 1975), rev'd on other grounds, 431 U.S. 951 (1977). See also Sledge v. J.P. Stevens, 12 E.P.D. ¶11,047 (E.D.N.C. 1976) (prospective award of fees for plaintiffs' expert necessitated by defendants' computerized records).

valid").[18]

The Senate left little doubt about the case law it intended to incorporate:

> The appropriate standards, see Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and Swann v. Charlotte Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.

S. Rep. No. 94-1101, supra, at 6. These cases were carefully chosen to include both statutory -- Davis and Swann, supra, -- and non-statutory "private attorney general" -- Stanford Daily, supra, -- fee awards and to include a broad range of attorneys' fee issues including the recoverability of expert witness fees and

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[18] Research reveals no reported pre-1976 Title VII cases in which expert witness fees were discussed and disallowed.

paralegal and out-of-pocket expenses. Indeed, of these three paradigmatic cases, two involved the award of substantial expert witness fees -- Davis, noted above, and Swann.[19]

Thus, there can be little doubt that Congress acted deliberately and intentionally to incorporate an existing body of case law which clearly allowed for the inclusion of expert witness fees and all manner of reasonable out-of-pocket expenses[20] as part of "fees and costs."

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[19] Amicus was of counsel in Swann. Of the $23,972.33 in costs awarded by the district court, over one third was for expert witness fees and expenses.

[20] Even the bill's opponents understood this, as Congressman Bauman of Maryland made clear in his statement on the floor.

> I agree that people ought to have their rights vindicated, but could we not imagine a situation in which a so-called public interest lawyer, who may be financed independently, would be inclined to file a suit not only to test a legal point but also in the

The decision below ignored this extensive and clear legislative history. It also appears to have applied a "plain meaning" or "clear statement" rule requiring that Congress express its intent in the plain language of the statute. This rule has no basis in the case law; to the contrary, in the civil rights and fee areas, the Court has recognized as appropriate an approach to legislative drafting that deliberately adopts the wording of earlier statutes in order to incorporate by reference the existing case law. See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979)

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hope that the court would grant his client plaintiffs' legal fees, and therefore his expenses?

122 Cong. Rec. H 12165 (daily ed., Oct. 1, 1976). As phrased by a supporter, Congressman Seiberling: "All we are trying to do in this bill is ... to get compensation for their legal expenses in meritorious cases." Id. at H 12155.

(implied cause of action under Title IX); Hughes v. Rowe, 449 U.S. 5 (1980); Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978) (higher standard for award of fees to prevailing defendant).

> The drafters ... explicitly assumed that it would be interpreted and applied as [these provisions] had been during the preceding [twelve] years.... It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to [these provisions and the case law], we are especially justified in presuming both that those representatives were aware of the prior interpretation ... and that that interpretation reflects their intent.

Cannon v. University of Chicago, 441 U.S. at 696-98. Congress deliberately incorporated expert witness fees into the fee shifting scheme of the Act by incorporating the prior case law. That decision should be respected.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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